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Supreme Court of the United States

OCTOBER TERM, 1959

No. 227

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND THOMAS J. McILWAINE, DIVISION SUPERINTENDENT OF SCHOOLS FOR PRINCE EDWARD COUNTY, VIRGINIA,

Petitioners,

v.

ULYSSES ALLEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: July 20, 1959.

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PETITION FOR A WRIT OF CERTIORARI

I.

INTRODUCTION

The County School Board of Prince Edward County, Virginia, and Thomas J. McIlwaine, Division Superintendent of Schools for Prince Edward County, Virginia, hereby petition that a writ of certiorari issue to review a decree entered by the United States Court of Appeals for the Fourth Circuit on May 5, 1959. That decree reversed an order entered by the United States District Court for the Eastern District of Virginia, Richmond Division, on November 26, 1958, and directed the District Court to do exactly the reverse of what he, in his discretion, had found appropriate in connection with desegregation of the public schools in Prince Edward County, Virginia.

II.

OPINIONS BELOW

The opinion of the District Court (Appendix A) is reported at 164 F. S. 786. The opinion of the Court of Appeals (Appendix C as amended by Appendix E) is reported at 266 F. 2d 507.

The full reported history of this case is as follows:

ACTION	DATE	REPORT
Decree of 3-judge District Court denying relief	March 7, 1952	103 F. S. 337
Probable jurisdiction noted	October 8, 1952	344 U. S. 1
Assigned for reargument	June 8, 1953	345 U. S. 972

ACTION	DATE	REPORT
Reversed in principle and assigned for reargument	May 17, 1954	347 U. S. 483
Continued	November 22, 1954	348 U. S. 886
Decision as to relief	May 31, 1955	349 U. S. 294
Dissolution of 3-judge District Court	July 17, 1956	142 F. S. 616
Decision as to further relief	March 26, 1957	149 F. S. 431
Reversed	November 14, 1957	249 F. 2d 462
Certiorari denied	March 3, 1958	355 U. S. 953
Decision as to further relief	August 4, 1958	164 F. S. 786
Reversed	May 5, 1959	266 F. 2d 507

III.

JURISDICTION

The opinion of the Court of Appeals and its order are dated May 5, 1959. Both the Court of Appeals and this Court thereafter denied a stay of further proceedings. On June 19, 1959, the Court of Appeals denied a Petition for Rehearing that had been filed by the Petitioners within the time prescribed by its rules. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

IV.

QUESTION PRESENTED

There is one question alone presented by this case:

Is a Court of Appeals permitted to substitute its discretion for that of a District Court as to the permissible means to be followed toward compliance with a school desegregation decree where this Court has said

that the broad discretion is vested in the District Courts and not in the Courts of Appeals?

This question should, we submit, be answered in the negative and the order of the Court of Appeals in this case should be reversed.

V.

STATEMENT OF THE CASE

This is one of the five original school segregation cases ultimately decided by this Court in 1955. It is, we believe, the only one of the five that remains in active litigation, although in Clarendon County, South Carolina, the locale of *Briggs* v. *Elliott*, another of the five cases, no steps toward desegregation have been taken.

An order was entered on remand from this Court requiring desegregation "with all deliberate speed." The Respondents thereafter sought further relief, and the District Court denied this application in a thoughtful opinion giving consideration to all relevant factors. 149 F. S. 431. His conclusion was summarily reversed by the Court of Appeals, 249 F. 2d 462, and certiorari was denied by this Court, 355 U. S. 953.

So the case went back to the District Court and the Respondents filed a further motion. Before the matter came on for hearing, the Petitioners acted. A means to save public education in rural southside Virginia is not easy to find and the action of the Court of Appeals made finding it more difficult. The School Board had exhausted all of its means to find a solution to the problem without outside help. So on July 2, 1958, by formal resolution, the School Board directed

the Superintendent of Schools to recommend to it an expert who would be employed:

> ". . . to consider the problems existing in the school system of Prince Edward County and to submit by report to the board his findings and recommendations. . . ."

The report would then be submitted to the District Court.

The case thereafter came on for further hearing before the District Court. Testimony was taken as to the action taken by the School Board and as to conditions existing in the County. No evidence was offered by the Respondents here.

On August 4, 1958, the District Court handed down a well considered and scholarly opinion. We invite the Court's careful attention to this opinion (reprinted in Appendix A). The Court pointed out that this Court had specifically given him wide latitude for the exercise of discretion. He noted that the Court of Appeals had directed him to require the Petitioners here to make a start toward compliance and had further required him to fix a time limit for ultimate compliance. So far as the former was concerned, the Court said:

> "The proposal of the defendants that a comprehensive survey of the entire problem be made by experts trained in the subjects involved is, so far as I am informed, an approach which has not been tried elsewhere. Considering the weight and importance which have been given psychological and sociological factors, such an approach would appear to have merit and to contain the possibility of a worth-while recommendation dealing with the problems peculiar to the particular community with which we are concerned."

As to a time limit for ultimate compliance, the Court

fixed ten years after the 1955 decision of this Court but the power to change this date, either by reducing the period or extending it, was specifically reserved, the power to be exercised in the light of conditions existing at any time.

Despite the fact that the District Court had done on remand exactly what the Court of Appeals had told him to do, the Court of Appeals on further appeal completely disregarded his conclusions and went entirely beyond the case that was before it. First, it mentioned only in a footnote, and in a manner designed to confuse rather than enlighten, the action taken by the School Board to find a solution to the problem. It said simply that:

> ". . . no argument is needed to show that the last delaying order of the District Judge cannot be approved, and that it has become necessary for his Court to give specific directions as to what must be done."

It then proceeded to write in terms an order for the District Court to enter. Its violence is rather amazing; although this case has since its inception in 1951 involved only the high schools of Prince Edward County, and there is no substantial evidence in the record even to support a finding that there are elementary schools in the County or that they are operated on a segregated basis, the Court of Appeals charged boldly into this field. It directed the District Court to enter an order:

> ". . . requiring the School Board to make plans for the admission of pupils in the elementary schools of the County without regard to race. . . ."

This is relief never requested by the Respondents who, as high school students and their parents, are not entitled to

request it; it is a determination by the Court of Appeals unsupported by evidence or argument of any character.

Thus the Court of Appeals eliminated the discretion of the District Court. And this Court may take judicial notice of the calamitous results. Although the expert study was and still is proceeding apace with every hope that it will bear fruit, the precipitate action of the Court of Appeals has devitalized it. The Board of Supervisors of the County, the County's governing body and not a party to this suit, has refused to levy any taxes or appropriate any money for public schools in the County for the year 1959-60. It has refused even to pay the salary of the Superintendent of Schools. Without money, public education comes to a standstill.

So, as the result of the action of the Court of Appeals in this case, there will be no public schools in Prince Edward County this fall. Unless this Court reviews and reverses this case, there will probably be no public schools in the County for many years to come.

VI.

REASONS FOR GRANTING THE WRIT

Our argument as to the necessity for granting the writ in this case is a simple one. It may be briefly stated.

This Court said in its 1955 decision that the District Courts should have broad discretion to accomplish desegregation of the schools. Its words were these:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibilities for elucidating, assessing, and solving these problems; courts will have to consider whether the

action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly we believe it appropriate to remand the cases to those courts." (349 U. S. at p. 299)

It is thus clear that the District Court with knowledge of local conditions that a Court of Appeals could have only by accident and does not have in this case was given unusually broad powers. But what the Court of Appeals has done in this case is to say exactly the reverse. It has required that the District Court conform exactly to its notions of how to accomplish desegregation and has left to the District Court only the ministerial function of entering orders that it prepares.

Did this Court mean that the District Courts should have broad discretion? If it did, the Court of Appeals was in error here and its action should be reversed. If it did not, the word "deliberate" has been removed from the phrase "all deliberate speed." The Southern States are entitled to know whether this Court requires that Negroes be admitted to white schools immediately upon application. If that be true, the rules are changed significantly and materially; there is only one rule to be applied regardless of local conditions.

The action of the District Court was entirely within the instructions previously given by the Court of Appeals. The Court of Appeals had said that a start must be made and an outside time limit for compliance fixed. 249 F. 2d 462. The District Court said that the expert study was an appropriate method of starting. Such a start was made in Clarendon County, South Carolina, and counsel for Respondents

expressed entire satisfaction with that procedure. The District Court fixed 1965 as an outside time limit; the plan of Little Rock, Arkansas, that received, by implication at least, the full approval of this Court, provides for compliance by 1963. See *Cooper* v. *Aaron*, 358 U. S. 1, 8 (1958). If 1963 is proper, is 1965 clearly outside the range of discretion? And the 1965 limit was not fixed for good; it is subject to change at any time upon a showing of a change in conditions.

The action taken by the Court of Appeals here is quite inconsistent with that taken by the Court of Appeals for the Fifth Circuit in *Rippy* v. *Borders*, 250 F. 2d 690 (1957). There the District Court, acting under the assumed compulsion of a prior order of the Court of Appeals, required immediate integration. In reversing, the Fifth Circuit said:

> ". . . the district court must exercise *its own* judgment and discretion in accordance with the applicable principles of law set forth in Brown v. Board of Education of Topeka, supra. It seems to us that the district court did not do this. . . ." 250 F. 2d at p. 693.

There, the District Court did not exercise discretion and was reversed; here it did exercise discretion and was reversed. It seems to us that the borders of the discretion of the District Courts are very far from clear and that the Courts of Appeals are very far from in agreement as to their delineation.

Nothing in *Cooper* v. *Aaron*, 358 U. S. 1 (1958), opposes our position here. In fact, Mr. Justice Frankfurter, concurring, supports the action of the District Court. The District Court believed that some additional time was necessary in Prince Edward County and that it was being constructively used. This is proper, in the view of the Justice, for:

> "Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms." 358 U. S. at p. 25.

Time, constructively used, is permissible. But the Court of Appeals here eliminates time; it requires final action now.

If this Court's determination that discretion in school cases rests in the District Courts and that the action of those courts within broad limits should be supported retains any vitality, the decision of the Court of Appeals in this case is wrong. Since there are thousands of school districts in the Southern States where the principles first announced in this case yet remain for judicial application, it is important that rules established by this Court be given more than lip service. At oral argument in this case, the late Mr. Justice Jackson stated that he foresaw a generation of litigation; his estimate as to length of time will turn out to be conservative unless the applicable rules are clear. This Court should review this case to make those rules clear; it should reverse this case to reestablish for the Federal judiciary the principles that it established in 1955.

VII.

CONCLUSION

The tragic events in Prince Edward County would have been averted if the Court of Appeals had given the District Court the area of discretion that this Court intended it to have. It is important that this Court make clear that it meant what it said.

This case should be reviewed and reversed.

Dated July 20, 1959.

Respectfully submitted,

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APPENDIX A

Opinion of United States District Court

(August 4, 1958)

STERLING HUTCHESON, *Chief Judge:*

This case comes before me again pursuant to a mandate from the United States Court of Appeals, Fourth Circuit, by *per curiam* opinion which is reported in *249 Fed. (2d), 462.* For a somewhat comprehensive history of the litigation, reference is made to my opinion reported in *149 Fed. Supp., 431.* As will be seen from an examination of those opinions, when the case was last before me I heard evidence and reached the conclusion that in the exercise of discretion vested in the District Courts by the Supreme Court in the cases reported as *Brown v. Board of Education, 347 U.S., 483, and 349 U.S., 294 (see also 345 U.S., 972),* the interests of the litigants and of the public would not be best served by fixing a definite date upon which the defendants should comply with the order prohibiting segregation of children in the schools of Prince Edward County solely on account of race. An appeal was taken and in accordance with the opinion mentioned, the Court of Appeals reversed my decision and remanded the case to me with certain directions.

The case as now before the Court has the following issues presented for determination.

1. A motion to intervene filed by J. B. Minnick, argued on June 6, 1958, and renewed on July 21, 1958.
2. A controversy concerning taxable costs.
3. A motion filed by the plaintiffs, seeking the entry of an order directing the defendants to comply with the injunction heretofore entered at the beginning

of the school term in September 1958, and a counter motion filed by the defendants for a general continuance pending a survey of the school problems in the County by an independent agency. These will be dealt with jointly.

These several matters will be considered in the order stated.

The Petition to Intervene

The petitioner, J. B. Minnick, a practicing attorney of Arlington, Virginia, seeks to intervene in his own right as a citizen and in behalf of others similarly affected and to have this Court re-examine certain constitutional issues. He contends that when this case, along with others known as the School Segregation Cases, and reported as *Brown v. Board of Education*, supra, was decided, the Supreme Court overlooked certain basic legal principles, particularly the statutes pertaining to land grant colleges and the provisions of the several acts admitting new states to the Union, with provision concerning operation of the schools of the state. I find it unnecessary to discuss the merits of his contentions. Whether these matters were called to the attention of the Supreme Court in these cases or were overlooked by that Court is beside the point. So far as this particular case is concerned, the law has been settled and it is too late for a review to be had in this proceeding. It follows that the petition to intervene must be denied.

Costs

The defendants question several items of costs which will be dealt with separately:

a. The plaintiffs seek the recovery of the sum of $215.00 expended for photographs showing the condition of the

respective school buildings, which were filed as exhibits at the original hearing. They also claim an item of $500.00 paid to Dr. Thomas H. Henderson, an expert witness called by the plaintiffs, who testified with respect to the inequality of the education facilities, and the sum of $725.00 as expert witness fees for Mrs. Evelyn W. Shaed, a statistician employed in the office of counsel for the plaintiffs. It appears clearly that under the rule followed by the Fourth Circuit in an opinion by Judge Parker in *Specialty Equipment and Machinery Corporation* v. *Zell Motor Car Company*, *193 Fed. (2d), 515, at page 520*, and cases cited, these items of cost should not be allowed. See also *Henkel* v. *Chicago*, *284 U.S., 444*, and *National Labor Relations Board* v. *School-Timer Frocks, Inc., Fourth Circuit No. 6981* (unreported).

b. The item of $446.40, witness fees allowed by the Clerk, is approved.

c. The defendants have withdrawn their objection to an item of $148.75, representing one-half of the cost of copies of certain records. It follows that this should be allowed.

d. Prior to the trial the defendants arranged with the court reporter to obtain daily transcripts of the proceedings. In accordance with the usual practice this was under a special arrangement with the reporter and he is permitted to make additional charges necessitated by the personnel required to furnish such service. Counsel for the plaintiffs with the approval of counsel for the defendant, arranged with the reporter to obtain a copy of the transcript, which, together with one-half of the per diem, amounted to $770.25. Plaintiffs contend that this item should be taxed as costs. While it is proper to tax as costs on appeal a copy of the transcript obtained by the prevailing party, this should be limited to the regular charges of the reporter for such tran-

script furnished in ordinary course and should not include the additional charge incident to the special service provided. It is therefore my conclusion that the plaintiffs should receive as a part of the taxable costs that portion of the item of $770.25 representing one copy of the transcript furnished in ordinary course.

The Motion of the Plaintiffs and the Counter Motion of the Defendants

When the motion of the plaintiffs was filed on June 6, 1958, counsel for the defendants indicated their desire to be heard and July 14 was fixed as the time. At the hearing defendants offered affidavits; but upon suggestion of counsel for plaintiffs that they desired an opportunity to cross-examine the witnesses, the defendants called the following residents of Prince Edward County: James T. Clark, Sheriff of Prince Edward County since March 1944, and prior to that time from February 1936 Deputy Sheriff, the successor in that office of his father, who had been Sheriff since the present Sheriff was five years of age; D. C. Womack, Commissioner of the Revenue of the County since January 1940, and prior to that time engaged in the wholesale grocery business in the County; Lester E. Andrews, a member of the School Board for four years and chairman during the last three, who is a retail lumber dealer; and B. Calvin Bass, now engaged in dairy farming at Rice, deputy chairman and former chairman of the School Board. Mr. Bass has had experience in teaching in the schools of the County and Hampden-Sydney College. He had teaching experience in Tennessee, including the position of School Principal and Assistant Superintendent. T. J. McIlwaine, who has been Superintendent of the schools for approximately forty years, was offered for cross-examination, with

the statement that his testimony would be corroborative of that already heard. He was then called by the plaintiffs under Rule 41 and cross examined.

These witnesses were unanimous in expressing the opinion that racial relations in the County have deteriorated to a marked degree since 1954. They believe that the effectiveness of the entire educational system in the County is suffering as a result of the atmosphere in which the schools are being operated. They express apprehension with respect to both violence and closing of the schools if the motion of the plaintiffs should be granted. The Sheriff pointed to the necessity of maintaining order in the County having an area of 354 square miles, bisected by highways over which school buses travel. It is his opinion that the local enforcement officers, reinforced by the entire state constabulary or highway patrol, would not be sufficient to maintain order if violence should erupt.

The conditions shown are to be deplored and those responsible may be the proper objects of censure if proper responsibility could be fixed. Considering the complexities of the entire problem this would present an impossible task, involving honest, sincere emotions felt by those on both sides of the controversy. However, we are faced with a situation rather than a theory and, being invested with a discretion in determining how this situation best may be met, it is necessary to seek a course to follow which appears in the best interest of all concerned at this time.

The defendants filed a copy of a recent resolution of the School Board authorizing the employment of expert professional assistance in conducting a survey and counselling the Board in connection with the entire school problem in the County. Superintendent McIlwaine has been charged with taking steps in this direction and testified that it is the

next order of business with him. The plaintiffs offered no evidence.

At the conclusion of the testimony counsel for the defendants filed a motion that further action be deferred pending a survey, as referred to, and the consequent formulation of plans by the School Board. The matter was then ably argued by counsel, the plaintiffs insisting that an order be entered directing a start toward compliance with the decree beginning in September 1958, and the defendants urging additional time within which to effect a plan of operation.

In approaching the problem it is well to bear in mind that ... not a law-suit nor is it a cause in equity in the conventional sense. In the first, the Court lays down legal principles to guide the parties. In a proceeding in equity the chancellor formulates the rules to be applied. In this case the District Judge must be guided by broad, flexible principles of equity while acting as arbiter of policies to be formulated and carried out by the local school authorities.

As pointed out by the Court of Appeals, compliance with the order may be brought about in ways other than by mixing schools.[1] However, this is a matter for determination by the local authorities subject to approval or disapproval of the Court. Supposing that the Court was apprised of a solution, it would not be within its province to direct its adoption since the Court has only the authority to approve or disapprove the acts of the defendants.

As set out in my opinion filed January 1957, the Supreme Court did not lay down rules to be followed by the District Courts in solving the problem, but left a wide latitude for the exercise of discretion. An examination of the opinion

[1] That Court pointed to voluntary continuation of the present system as one method of meeting the requirement. 249 Fed. (2d), 462, at page 465.

of the Court of Appeals decided November 11, 1957, supra, reversing my decision, reveals that that tribunal has been equally abstentious in charting a course. That Court refrained from pointing to what it regarded as the fallacies of my reasoning. Consequently, I do not have the benefit of its views as to the particulars of my errors nor have I been granted the assistance which might have been afforded had that Court seen fit to expound its interpretation of the language of the Supreme Court in the Brown cases with which I am seeking to comply. The only light thrown upon the subject by the Court of Appeals is found in the following language:

> "; and we think that the District Judge was in error in not fixing a time limit for compliance with the order heretofore entered in the cause."

As authority for this conclusion the Court quoted from an opinion by the Chief Judge of the Fifth Circuit in *Jackson* v. *Rawdon*, 235 Fed. (2d), 93, 96, to the effect that the plaintiffs there were entitled to have the defendants "* * * acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration * * *".

We turn to that opinion to ascertain what right the plaintiffs there were seeking to establish and find that it does not involve fixing a time limit to comply with an order. The plaintiffs there were seeking merely a declaration of their rights by the Court. The sentence in the opinion of the Chief Judge of the Fifth Circuit following the sentence partially quoted by the Fourth Circuit Court reads as follows:

> "Had the Court made such a declaration (of the constitutional rights of the plaintiffs) and retained the cause for further orders necessary to implement it, deferment to a later time of action on the prayer for injunctive relief, if necessary, may well have been within his discretion."

In my initial study of the Brown cases, I considered *Jackson* v. *Rawdon*, and was influenced, in part, by that opinion in reaching my conclusion stated in January, 1957, supra. Finally, the opinion of the Fourth Circuit concludes with directions that this Court enter an order directing the defendants to "make a prompt and reasonable start toward complying with the Court's order enjoining discrimination on the ground of race or color in admitting children to the schools under their supervision".

So, as is seen, the Court of Appeals has said in broad and general terms that I was in error in not fixing a time limit for compliance, that I should say plainly the defendants must comply without further delay and a prompt and reasonable start must be made. It is to be observed that the Court refrained from indicating what would be a proper time to fix, what act of compliance must be without further delay, and they have failed to define a prompt and reasonable start. It is clear that the Court recognizes what the Supreme Court announced, namely, that the responsibility is upon the District Court to pass upon the details. Working out the details is not an assignment of a minor nature and if I am to use that discretion called for by the Supreme Court, recognized by the Court of Appeals and which should motivate a chancellor in applying equitable principles, the difficulties must be recognized.

In this state of affairs I feel that it is proper that I further discuss the problem and give my reasons for the conclusions

to be stated. The Court of Appeals says correctly that the enforcement of a right may not be denied because of action taken or threatened in defiance of such right. But the Supreme Court has announced in an epochal opinion that the exercise of a right guaranteed by the Constitution of the United States may be deferred until necessary local adjustments in the public interest may be effected. It is clear that Court did not anticipate hurried, ill considered action. Judging from the experience of other localities it may be observed that violence may be within the realm of probability if precipitate action is taken. While this consideration of itself is secondary the psychological effect of such conditions upon immature children is of primary importance. It must be ever borne in mind that the children are those for whom the entire educational system was devised and their interests are not to be lost sight of in the conflicts of the adult world in which they live.

So far as I have been able to ascertain, the nearest analogy afforded by decided cases is that of *Rippy v. Borders, 250 Fed. (2d), 690*, decided December 1957 by the Fifth Circuit. Stripped of legal and procedural niceties it appears that the District Court twice declined to order compliance with the decision in the Brown cases. Twice he was reversed. He then entered an order fixing the mid-winter term in January 1958 as the time for compliance and again he was reversed. *See 133 Fed. Supp., 811, 233 Fed. (2d), 796, 146 Fed. Supp., 485, 247 Fed. (2d), 268, ... Fed. Supp. .....* For a concise statement of the history of this litigation see also *3 Race Rel. Law Rep., 17*. It is quite true that the facts in that case may be distinguished from those in the instant case, but the Court of Appeals there made it clear that "the authority to administer the public schools is vested in the appellants, the Board and the Superintend-

ent, and, of course, they are the ones required to make the necessary arrangements referred to in the judgment to be entered by the District Court as directed by our mandate." After stating that should the local authorities fail to meet their primary responsibility, then the duty will devolve upon the District Court to hold a hearing and proceed so as to require compliance, the Court used the following language:

> "In the performance of their duty, the District Court must exercise *its own* judgment and discretion in accordance with the applicable principles of law set forth in *Brown v. Board of Education of Topeka*, supra." (Emphasis by the Court).

In the argument before me it was urged that since the local authorities have not adopted a plan, an order directing immediate compliance should be entered upon the theory that the Court under those conditions would not be responsible for the consequences which might result. I am unable to agree that this would be a proper discharge of the responsibility placed upon the Court. In his dissenting opinion in the case of *Sharp v. Lucky*, 252 Fed. (2d), 910, at 924, Circuit Judge Ben F. Cameron, of the Fifth Circuit, aptly stated the responsibility resting upon the District Judges. In referring to the period in the life of the Nation which has become well known as "The Tragic Era" from the title given his book by Claude G. Bowers,[2] Judge Cameron said:

> "This sad epoch in our history was fomented in no small part, by well-intentioned men in too much of a hurry. The basic lesson wise men have learned from its excesses and its tragedies is that civil rights can be insured and protected only by local government

[2] "The Tragic Era—The Revolution after Lincoln" 1929 The Riverside Press, Cambridge, Mass.

administered by men with a sympathetic understanding of the many facets of the problems involved; men who approach their task in a spirit of friendship and local obligation. Government can succeed only when its mandates deserve and command the respect and the consent of the governed.

* * *

"If we, in whose hands responsibility for leadership and judgment is placed, open our eyes to the teachings of history and perform our duties with patience, with sympathy and with common sense, we shall make a contribution toward averting a repetition of an epoch from which nobody derived any benefit and in which everybody suffered."

To this might be added the warning that if we make mistakes by impatience and failure to consider and to endeavor to understand, however good our intentions may be, we are responsible for the consequences because that responsibility has been placed upon us by the Supreme Court. For my part, I believe much harm can be caused by ill considered action. The conditions which have arisen in other places constitute a warning which should not be ignored.

We hear such terms as "the jet age", "a new day" and "crash programs" used as excuses for speedy action. These catch phrases are not consistent with the "deliberate speed", the "unhurrying chase" and the "unperturbed pace" ascribed by Thompson to his Hound of Heaven. Furthermore, they are not applicable to the situation with which we are dealing.[3] In the case cited in the footnote the Supreme Court recognized the difference between action by an individual and

[3] As pointed out by Mr. Justice Holmes in Virginia v. West Virginia, 222 U. S. 17 at pages 19-20 (1911), "But a state cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed."

action by a state. The distinction appears to be in point. Despite the great advances made in scientific and technical knowledge we have no evidence upon which to base a belief that in accepting new theories of social or moral reform the modern human mind is any more adaptable than that of the Athenian of 500 B.C. The knowledge of preceding generations can be preserved in writings but wisdom can not be transmitted by inheritance. It must be acquired by experience.

In dealing with problems accompanying such reforms we must look to the teachings of history if we are to avoid treacherous shoals. History affords many lessons we would do well to heed.

We find that following the adoption of his code of laws, which he described, not as the best that could be given the people but, as "the best they could receive", Solon, in order to afford a period for its acceptance by the people and to avoid importunities for interpretation, modification, etc., absented himself for ten years during which he visited foreign countries. Upon his return there yet remained much to be done.[4]

Later we find the admonition of The Great Teacher that morality can not be enforced by Pharisaic legalism. He pointed to the truth that the application of external force will not "cleanse * * * that which is within the cup and platter"[5], the essential first step in reform.

Innumerable illustrations might be used. Among more modern ones, reference has already been made to the period

[4] Plutarch relates that: "And, therefore, when he (Solon) was afterwards asked if he had left the Athenians the best laws that could be given, he replied, 'The best they could receive'." Plutarch's Lives, New York, McKinlay, Stone and MacKenzie—1924.

[5] Matthew 23:25, 26.

in the history of our country known as "The Tragic Era", which has also been called "The Age of Hate"[6].

Within the memory of many of us, this Nation embarked upon a sudden and determined effort to enforce upon the people a code of morality adopted as an amendment to the Constitution of the United States. It was designed to reform the customs of the Nation in the use of intoxicating liquors and it was called "The Noble Experiment". To assist the Government in its enforcement a nationwide moral crusade was waged by private enterprise and religious organizations. The failure of the experiment is too well known to require discussion. That action was too precipitate. There had not been a sufficient preparatory cleansing of the inside "of the cup and of the platter". Contrary to the situation before us, there was no provision for flexibility of enforcement. The history of civilization is a story of trial and error. We have here a more reasonable rule to follow than that which prevailed under the 18th Amendment and the statutes enacted under that Amendment. Within the bounds of this rule latitude is allowed for meeting conditions in a practical manner in the search for the correct solution.

It should be pointed out that in none of the episodes referred to was the emotional appeal more deeply seated or based upon more honest convictions of right on both sides to the controversy than in the situation before us nor was the impact more far-reaching.

It has been demonstrated that the hearts and the minds of men can not be controlled by legislation nor by force. It has been demonstrated that violence can be quelled by force, such as the use of troops, but unless proper prelimi-

[6] "The Age of Hate; Andrew Johnson and the Radicals"—George Fort Milton. New York. Coward-McCann, Inc.—1930

nary preparation has been had, when the force is removed festering scars remain requiring treatment of the type administered by Judge Harry J. Lemley of the Eastern District of Arkansas in his recent opinion in *Aaron* v. *Cooper*, civil action 3113, filed June 21, 1958, known as the Little Rock case. It is realized that these observations may appear trite, but in periods of stress we often need to recall to mind and to be guided by simple truths, which we are prone to overlook at times.

It is belaboring the point to again call attention to the obvious fact that the Supreme Court recognized all this as disclosed by its language in the *Brown* cases. A reading of those opinions clearly reveals that the Court should not confuse delay with defiance of or non-compliance with the law. The law must be observed and the questions here to be determined relate only to the method and time of such observance. Over-hasty action necessitating a backward step is less conducive to proper law enforcement than action taken after carefully considered delay, even though the Court may be criticised for delay by those impatiently urging speedy action.

The defendants should proceed promptly with the formulation of a plan which will comply with the order heretofore entered enjoining them from discriminating against the plaintiffs in admission to the schools in the County solely on account of race. They have indicated their purpose to so proceed.

The proposal of the defendants that a comprehensive survey of the entire problem be made by experts trained in the subjects involved is, so far as I am informed, an approach which has not been tried elsewhere. Considering the weight and importance which have been given psychological and sociological factors, such an approach would appear to have

merit and to contain the possibility of a worth-while recommendation dealing with the problems peculiar to the particular community with which we are concerned.

I do not conceive it to be within the province of the Court to specify what steps the defendants should take but deem it not inappropriate to make this comment concerning their proposal. As declared by the Supreme Court in the *Brown* cases and by the Fifth Circuit in *Rippy* v. *Borders*, the primary responsibility is theirs and the function of this Court is to either approve or disapprove their actions.

The Court of Appeals has directed that a date be fixed for compliance with the mandate.

In determining what would be a proper time to fix for compliance, a number of factors and some precedents have been considered. Obviously, it is not in the best interest of those concerned to comply with the suggestion of the plaintiffs that compliance be had with the beginning of the school year in September 1958. Such a course would be unrealistic. It is equally obvious that at this time there is no evidence before the Court upon which to base an opinion as to what would be a proper time. It is anticipated that progress reports to be made by the defendants in the future will throw light upon this phase of the problem. Turning again to precedent available in somewhat comparable situations, it is recalled that Solon considered ten years an appropriate interval to allow for adjustments to far-reaching changes in the customs of a people. The period of greatest turmoil following the death of President Lincoln, is regarded as about twelve years. The efforts to enforce the 18th Amendment were concentrated over a period of some twelve or fourteen years. Concededly, these yardsticks are of limited aid but they do reflect some past experiences with human behavior. No better measure has been suggested nor has one occurred to me. As I have pointed out previously, it

is not possible for a Court to forecast conditions which will exist in the future. It can only find facts which exist at a stated time, past or present.[7] In full realization of this limitation but faced with directions from the Court of Appeals to fix a date and believing that some assurance of stability of conditions in the immediate future may be beneficial to the people of the County, in their efforts to meet the changed conditions, I fix ten years following the 1955 decision in the *Brown* cases as the time for such compliance. However, because of the uncertainty of conditions during the interval and the absence at this time of a sound basis for this conclusion, the power to change this date by either reducing or extending the time will be expressly reserved and action under such reservation will be in accord with what may develop in the future.

An order will be entered directing an immediate start in the necessary preliminary steps looking to the formulation of a plan, with directions that on or before January 1, 1959, the defendants inform the Court concerning progress to that date. The report should reflect the scope and purpose of the survey and general information regarding the qualifications of such consultant or consultants as have then been engaged. The order will direct compliance with the terms of the injunction heretofore entered at the beginning of the school year for 1965, unless such order should be modified during the interval. The order will expressly reserve to the Court the power to modify it by accelerating or extending the date of compliance and in such other respects as the best interest of the parties and of the public may appear proper including the power to direct additional reports from time to time as may be deemed appropriate.

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[7] 149 Fed. Supp., 431, at page 439.

APPENDIX B

Order of United States District Court

(November 26, 1958)

This matter having been heard, the Court upon consideration of the evidence and argument of counsel, for the reasons set forth in writing filed herein on August 4, 1958, (164 Fed. Supp., 786), is of opinion and doth *Adjudge, Order* and *Decree* that:

1. The motion to intervene filed by J. B. Minnick should be, and it hereby is, denied.

2. Upon a review of the taxation of costs by the Clerk the plaintiffs are allowed the following items of costs:

   a. $440.40 witness fees;

   b. The sum of $148.75, being one-half of the cost of copies of certain records;

   c. The amount properly chargeable for one copy of the transcript of the proceedings to be computed by the official court reporter.

The remaining costs claimed by the plaintiffs are denied.

3. The defendants are directed to proceed promptly with the formulation of a plan to comply with the order heretofore entered enjoining them from discriminating against the plaintiffs in admission to the public schools of the County solely on account of race. Said defendants are further directed to report to the Court on or before January 1, 1959, the progress made in the formulation of such plan, said report to reflect the purpose and scope of any survey made or to be made in connection with the preparation of said plan and information concerning the qualifications of such consultant or consultants as have been or may be engaged by said defendants to conduct such survey.

It is further *Ordered* that the defendants comply with the terms of the injunction heretofore entered at the beginning of the school year 1965, unless this order should be modified during the interval.

The Court expressly reserves the power to modify this order in such respects as the best interest of the parties and of the public may appear proper by accelerating or extending the date of compliance and by the direction of additional reports from time to time or in such other special or general manner as to the Court may appear proper and as may be shown by future developments in this proceeding.

(s) Sterling Hutcheson
United States District Judge

APPENDIX C

Opinion of United States Court of Appeals for the Fourth Circuit

(May 5, 1959)

PER CURIAM:

This litigation, which looks to the desegration [*sic*] of the races in the public schools of Prince Edward County, Virginia, began nearly [illegible] years ago on May 23, 1951, when a class suit on behalf of a number of colored pupils of high school age was entered against the County School Board in the District Court below. Since that time the case has been continuously before the courts and the principle of desegration [*sic*] has been firmly established, but no steps to bring it about in the County have been taken by the school authorities. The last order of the District Court, from which this appeal was taken, was issued November 26,

1958, and therein the School Board was directed to proceed promptly with the formulation of a plan of desegration [*sic*] and to report the progress made in the formulation of the plan to the court on or before January 1, 1959.[1] But by the same order the school authorities were given seven additional years, until the beginning of the 1965 school year, to put the plan into operation unless the order should be modified in the meantime. This date was fixed because the judge was of the opinion that the School Board should have ten years from the second decision of the Supreme Court in *Brown v. Board of Education* on May 31, 1955 (349 U.S. 249) in which to give effect to its mandate that the plaintiffs be admitted to the public schools of the County on a racially nondiscriminatory basis with all deliberate speed.

The question on this appeal, in view of the proceedings which have already taken place, is whether this order of the District Court conforms to the requirements which the Supreme Court has laid down. The original complaint was based on the proposition that the segregation of the races in the public schools of a state is a violation of the Federal Constitution and upon the further ground that if segregation accompanied by equality of treatment is valid the facilities afforded the colored pupils in the public schools of Prince Edward County were grossly inferior to those furnished to the white pupils. In reply the School Board contended that segregation if properly administered is valid, but admitted that the facilities furnished Negro pupils were inferior and stated that prompt steps to bring about equality at an early date were being taken. After hearing the case the three judge court rendered an opinion on March 7, 1952, in which it upheld the first defense in principle but ordered

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[1] We were informed at the argument of this appeal that the County School Board has reported that it has employed an expert to advise it as to the situation in the schools of the County.

that the School Board pursue with diligence and dispatch their program to replace the old facilities furnished Negro pupils and remove the inequality. 103 F.Supp. 337.[2]

An appeal from this decision was taken to the Supreme Court of the United States and the case was one of the group which was decided by that Court in *Brown* v. *Board of Education*, 347 U.S. 483, on May 17, 1954, and *Brown* v. *Board of Education*, 349 U.S. 294, on May 31, 1955. Thereby the decision of the three-judge court was reversed and the case was remanded for further proceedings as indicated above. Upon the remand the three-judge court, on July 18, 1955, ordered compliance with the mandate of the Supreme Court but found that it was impracticable to effect the change in the schools of the County for the school year beginning in September, 1955, and retained jurisdiction for further consideration and action.[3]

Thereafter, on April 23, 1956, the plaintiffs moved the court to comply with the mandate of the Supreme Court as to the secondary schools of the County not later than the school term beginning September 1956. Accordingly, the three-judge court was reconvened but, since the constitutional questions involved in the case had been conclusively determined, it was ordered that the court be dissolved and that further proceedings in the case be directed by United States District Judge Hutcheson. 142 F.Supp. 616. In subsequent proceedings before the single District Judge, consideration was given to the plaintiffs' prayer for further relief and also to an answer of the defendants resisting such

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[2] A new building for Negro pupils has since been erected.

[3] At this time an intervening complaint was filed in the case by the parents of Negro children of high-school age which adopted all of the allegations of the original complaint and pointed out that they had not completed their course of instruction in the public elementary schools when the suit was filed.

relief, and a motion of the defendants that the plaintiffs' case be dismissed on the ground that an adequate remedy had been furnished them by certain acts of the Legislature of Virginia, passed at its session of 1956, and praying that the three-judge court be reconvened to consider this new phase of the case.[4]

The District Judge disposed of these motions in an opinion filed on January 23, 1957, 149 F.Supp. 431, which was followed by an order of March 26, 1957, in which the decision on the motion of the plaintiffs for further relief was withheld with reservation to the plaintiffs of the right to renew the motion at a later date after the defendants had been afforded a reasonable time to effect a solution. By the same order the judge denied the motion of the defendants that a three-judge court be convened but declined to pass on the matters raised in the defendants' motion to dismiss.

An appeal was taken from this decision and it was reversed by this Court on November 11, 1957, 249 F.2d 462, wherein the case was remanded to the District Court with direction to enter an order directing the defendants to make a prompt and reasonable start toward complying with the court's order enjoining discrimination on the ground of race or color in admitting children to the schools under the supervision of the County School Board. The attention of the District Court was called to the order passed by this court on December 31, 1956, in *County School Board of Arlington County* v. *Thompson*, 240 F.2d 59, wherein an order enjoining the *County School Board of Arlington County* to begin the desegregation of the elementary schools of the County in the 1956-57 term and the high school in

[4] The acts of the Legislature of Virginia of 1956 relating to the public schools of the state were considered by a three-judge court in James v. Almond, D.C., E.D.Va., 170 F. Supp. 331.

the 1957-58 term was approved. It was there pointed out that it had been two years since the first decision of the Supreme Court in *Brown v. Board of Education* and that the County School Board, despite repeated demands, had taken no steps to remove the requirement of segregation in the schools. In that case (page 64) we said:

> "* * * This was not 'deliberate speed' in complying with the law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence, which justified the issuance of the injunctions to dispel the misapprehension of school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court."

After this quotation from the Arlington County case we used the following language with respect to the delay of the school authorities of Prince Edward County (249 F.2d 462, at 465) in the case now under consideration:

> "In the case at bar the order entered on June 29, 1955, while finding that it was impracticable to place the schools on a nondiscriminatory basis before September 1955, enjoined the defendants 'from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school, from and after such time as the defendants may have made the necessary arrangements for admission of children to such school on a nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause.' More than a year and a half had elapsed after the entry of this order, the school year of 1955-56 had come and gone, another

school year had been entered, and no steps had been taken to comply with the order. The time had unquestionably come to say plainly to the defendants that they must comply without further delay."

The response of the District Judge to this last decision of this court in the pending case was to allow the County School Board of Prince Edward County the additional period of seven years within which to integrate the schools of the county. So far as can be gleaned from the opinion of the District Judge, the reasons which guided him in prolonging the period of inactivity and deferring integration in the public schools until 1965 were the findings that racial relations in the County had deteriorated in a marked degree since the first decision of the Supreme Court in 1954 and that violence may be within the realm of probability if precipitate action is taken, and that it is against the interests of immature school children that they should be psychologically disturbed by such conditions. In the course of the opinion reference was made, with approval, to the decision of the District Judge in *Aaron* v. *Cooper*—known as the Little Rock Case—163 F.Supp. 13, decided June 20, 1958, wherein a plan for gradual racial integration of public schools in Little Rock which had been adopted by the school board was suspended until the 1960-61 school year, because of popular opposition marked by incidents of more or less serious violence against Negro students and their property. With this decision in mind the judge in the pending case reached the conclusion that the School Board of Prince Edward County might defer action until 1965.

The proceedings of the District Court outlined above and the total inaction of the School Board speak so loudly that no argument is needed to show that the last delaying order of the District Judge cannot be approved, and that it has

become necessary for this Court to give specific directions as to what must be done. This becomes even more clear in view of the decision of the Supreme Court of the United States on September 29, 1958, in *Cooper* v. *Aaron*, 358 U.S. 1, wherein the order of the United States District Court for the Eastern District of Arkansas suspending the integration plan adopted by the local school board was reversed. The Supreme Court said, pages 16 and 17:

> "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in an unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan* v. *Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." * * *
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> "* * * In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' Smith v. Texas, 311 U.S. 128, 132."

We are advertent to the fact that the problems which confront a school board in a municipality are different from those which the school board must meet in a completely rural community such as Prince Edward County where the races are approximately equal in number. This difference, however, has already been given effect in the present instance. Other communities in the state have taken steps to meet the question and solve it, whereas in Prince Edward County the school authorities have taken no effective action whatsoever during the four years since the second decision in *Brown* v. *Board of Education* was rendered, and even today contemplate no action in the future. Under these circumstances it is incumbent upon this Court to take steps to give effect to the mandate of the Supreme Court of the United States.

The order of the District Court in the pending case will therefore be reversed and the case remanded with direction that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County; and requiring the defendants to receive and consider the applications of such persons for admission to the white high school of the County on a non-racial basis without regard to race or color; and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white school in the school term beginning September 1959; and also requiring the School Board to make plans for the admission of pupils in the elementary schools of the County without regard to race and to receive and consider applications to this end at the earliest practical day. The order of the District Judge shall also provide that state laws

as to the assignment of pupils to classes in the public schools of the County shall be observed so long as such laws do not cause discrimination based on race or color, and that the administrative remedies therein provided must be exhausted before application is made to the court for relief on the ground that its injunction is being violated; and the order shall further provide that the suit remain upon the docket of the court and that the court retain jurisdiction thereof for such further action as may be necessary, including the power to enlarge, reduce or otherwise modify the provisions of the decree.

The plaintiffs make the additional contention that they should be allowed as part of the costs of the original hearing certain sums expended by them for the employment of expert witnesses, the procurement of photographs and the additional cost of daily transcript of the testimony which the District Judge disallowed. So far as the expense of the expert testimony and the photographs is concerned, reference is made to the allowance of items of this character to the prevailing parties in various patent cases. In respect to these items, we think the judgment of the District Court should be affirmed. The case was an important one from the standpoint of both parties and the propriety of making a full presentation cannot be doubted. However, much of the expense of these items was incurred in order to show that the schools provided for the Negro pupils were inferior to the white schools and this charge was admitted in the answer of the defendants so that the expenses incurred, although useful, were hardly essential. We think, however, that the additional expense incurred by the plaintiffs for daily copy of the transcript of the testimony should be allowed. The proposal to have daily copy of the testimony was first made by the defendants, and it was well-nigh essential for the plaintiffs to try the case on an equal footing with their opponents. The ordinary costs

of the transcript of the testimony are usually borne by the losing party and it would seem that the same rule should be applied in the case like the present, in which the parties agreed at the outset that daily copy should be provided. The judgment of the District Court will therefore be amended to make this additional allowance of costs to the plaintiffs. Let the mandate issue forthwith.

Reversed and Remanded.

APPENDIX D

Order of United States Court of Appeals for the Fourth Circuit

(May 5, 1959)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said District Court appealed from, in this cause, be; and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings in accordance with the opinion of the Court filed herein. Let mandate issue forthwith.

Morris A. Soper
United States Circuit Judge

Clement F. Haynsworth, Jr.
United States Circuit Judge

Roby C. Thompson
United States District Judge

APPENDIX E

Order Correcting Opinion of United States Court of Appeals for the Fourth Circuit

(June 10, 1959)

It is ordered that the per curiam opinion filed in the above-entitled case on May 5, 1959, be amended by changing the fourth word in the third line of the first sentence thereof from "nine" to "eight".

Morris A. Soper
United States Circuit Judge

Clement F. Haynsworth, Jr.
United States Circuit Judge

APPENDIX F

Order Denying Petition for Rehearing and Stay

(June 19, 1959)

The petition for rehearing filed herein May 22, 1959, has been read and considered and is hereby denied.

The accompanying motion to recall the mandate, which issued forthwith in accordance with the direction of the court upon the filing of its opinion on May 5, 1959, has been read and considered, and in view of the fact that this case has been pending in the District Court since May 23, 1951, and no step has been taken by the school authorities looking toward the desegregation of the races in the public schools of Prince Edward County since that time, other than the appointment of an expert in December, 1958 to advise the County School Board as to the school situation in the county,

and in view of the fact that the County School Board may apply to the Supreme Court of the United States, if they see fit, for a stay of further proceedings in this case pending the filing of a petition for writ of certiorari, the motion to recall the mandate is hereby overruled.

Morris A. Soper
United States Circuit Judge

Clement F. Haynsworth, Jr.
United States Circuit Judge

Roby C. Thompson
United States District Judge